

No. 16534 ✓

United States
Court of Appeals
for the Ninth Circuit

TIME OIL CO., a corporation, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 50122

TIME OIL CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1953

Aug. 17—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 18—Copy of petition served on General Counsel.

Aug. 17—Request for Circuit hearing in Seattle, Washington, filed by taxpayer. 9/3/53 granted.

Sept. 18—Answer filed by General Counsel.

Sept. 18—Request for hearing in Seattle filed by General Counsel.

Sept. 24—Copy of answer and request served on taxpayer. Seattle.

1955

Mar. 14—Hearing set June 13, 1955, Seattle, Washington.

June 16—Hearing had before Judge Withey on the merits.

—Stipulation of Facts, filed at hearing.
Briefs 9/14/55. Replies 10/14/55.

July 13—Transcript of hearing 6/16/55 filed.

1955

Aug. 18—Brief filed by taxpayer. 9/15/55 copy served.

Sept. 14—Brief filed by General Counsel. 9/15/55 copy served.

Oct. 13—Reply Brief filed by taxpayer. Copy served.

Oct. 14—Reply Brief filed by General Counsel.

Oct. 24—Reply Brief to respondent's reply Brief, filed by taxpayer. Copy served.

1956

Sept. 19—Findings of fact and opinion filed. Withey J.

—Decision will be entered under Rule 50. 9/19/56 served.

Oct. 22—Agreed computation for entry of decision filed.

Oct. 29—Decision entered, Judge Withey, Division 4. 10/30/56 served.

1957

Jan. 14—Bond in the amount of \$217,162.00 approved and filed.

Jan. 14—Petition for review by United States Court of Appeals, Ninth Circuit, filed by petitioner.

Jan. 16—Proof of Service filed.

Jan. 16—Designation of contents of record on appeal with proof of service thereon, filed.

Feb. 15—Transcript of original record sur petition for review sent Clerk, U. S. Ct. of Appeals, 9th Circ.

1958

Sept. 8—Mandate from U.S.C.A. 9th Circ. remanding case to Tax Court for further proceedings, filed.

Sept. 11—Order, that proceedings be set Dec. 3, 1958, Wash. D. C. with right of both parties to submit recomputations on or before that date, entered.

Nov. 18—Joint motion for continuance to Jan. 15, 1959, at Wash. D. C. Granted 11/19/58 to Feb. 18, 1959. Served 11/21/58.

1959

Jan. 27—Order that case is stricken from the motions cal. of Feb. 18, 1959, at Wash. D. C. and continued to the motions cal. of March 4, 1959, at Wash. D. C. on or before which date the parties may submit recomputations, or otherwise, move.

Feb. 27—Resp. computation for entry of decision filed.

Mar. 2—Petr. computation for entry of decision filed.

Mar. 2—Order, that case is stricken from cal. March 4, 1959, Wash. D. C. and continued for further proceedings under the mandate to April 1, 1959, Wash. D. C. Resp. computation filed Feb. 27, 1959 and Petr. computation filed March 2, 1959, are also placed upon that calendar. Served 3/3/59.

Mar. 23—Petr's objections to resp's computation for entry of decision. Served 3/24/59.

1959

Mar. 31—Memo. Brief filed by resp. Served 3/31/59.

Apr. 1—Hearing on further proceedings under the mandate; resp. computation; petr. computation. Referred to Judge Withey.

Apr. 7—Decision entered, Judge Withey. Served 4/8/59.

May 4—Petition for Review by U. S. Ct. of Ap. 9th Circ. filed by petr.

May 5—Proof of Service filed.

May 11—Designation of Contents of Record on Rev. with proof of service thereon, filed.

May 26—Order extending time to file record on rev. and docket pet. for rev. to Aug. 2, 1959.

Tax Court of the United States

Docket No. 50122

THE TIME OIL COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RESPONDENT'S COMPUTATION FOR
ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to the Tax Court of the United States in compliance with the opinion

and mandate of the United States Court of Appeals for the Ninth Circuit. Said computation shows there are deficiencies in income tax for the taxable year 1949 in the amount of \$32,588.60 and for the taxable year 1950 in the amount of \$22,889.39.

/s/ ARCH M. CANTRALL,
Chief Counsel,
Internal Revenue Service.

Of Counsel: Charles Owen Johnson, Special Attorney, Internal Revenue Service.

STATEMENT OF ACCOUNT

In re: The Time Oil Company
Seattle, Washington

T. C. Docket No. 50122, C.A. 9th

Taxable Years 1949 and 1950

Taxable Year 1949

Income tax liability recomputed in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit filed on July 30, 1958..... \$182,771.78

Original assessments:

Original, Account 4-410045.....	\$120,311.28	
Amended return, Account 8-420206.....	29,871.90	
	<hr/>	150,183.18

Deficiency which the Tax Court should have determined	\$ 32,588.60
---	--------------

Income tax assessed:

Original, Account 4-410045.....	\$120,311.28
Amended return, Account 8-420206.....	29,871.90

Total assessed	<hr/> \$150,183.18
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Statement of Account—(Continued)

Taxable Year 1949—(Continued)

Income tax paid:

March 15, 1950.....	\$ 24,599.46
April 15, 1950, \$5,505.75 less \$27.39 interest	5,478.36
June 15, 1950.....	30,077.82
September 15, 1950.....	30,077.82
November 8, 1950.....	477.94
December 15, 1950.....	29,599.88
August 11, 1950.....	15,184.90
August 22, 1950.....	477.94
November 8, 1950 \$14,935.94 less \$726.88 interest	14,209.06
Total paid	\$150,183.18
Unpaid assessment	None
Income tax liability.....	\$182,771.78
Paid	150,183.18
Deficiency in income tax.....	\$ 32,588.60

Statutory notice mailed June 1, 1953.

Petition filed August 17, 1953.

Taxable Year 1950

Income tax liability recomputed in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit filed on July 30, 1958.....	\$126,752.37
Original tax assessed, Account 7-418035.....	103,862.98
Deficiency which the Tax Court should have deter- mined	\$ 22,889.39
Income tax assessed:	
Original, Account 7-418035.....	\$103,862.98
Income tax paid:	
March 14, 1951.....	\$ 34,983.30
June 15, 1951.....	27,334.48
September 15, 1951.....	20,772.60
December 18, 1951.....	20,772.60
Total paid	\$103,862.98

Statement of Account—(Continued)

Taxable Year 1950—(Continued)

Unpaid assessment	None
Income tax liability.....	\$126,752.37
Paid	103,862.98
Deficiency in income tax.....	\$ 22,889.39

Statutory notice mailed June 1, 1953.

Petition filed August 17, 1953.

STATEMENT

In re: The Time Oil Company
Seattle, Washington

T. C. Docket No. 50122, C.A. 9th

Taxable Years 1949 and 1950

	Income Tax		
Year	Liability	Assessed	Deficiency
1949	\$182,771.78	\$150,183.18	\$32,588.60
1950	126,752.37	103,862.98	22,889.39

In compliance with the request contained in memorandum of the Office of the Chief Counsel dated February 20, 1959, a recomputation has been made in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit filed on July 30, 1958.

Schedule 1
Adjustments to Net Income

	1949	1950
Net income shown in statutory notice of deficiency dated June 1, 1953.....	\$572,462.02	\$413,802.67
Less: Miscellaneous income	4,750.00	
Contributions		6,584.58
Net income recomputed in accordance with the decision of the Tax Court	\$567,712.02	\$407,218.09
Less contributions to profit sharing trust	75,557.59	58,074.14
Corrected net income recomputed in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit	\$492,154.43	\$349,143.95

Statement—(Continued)

1949

Schedule 2

Computation of Income Tax

Corrected net income, Schedule 1.....	\$492,154.43
Less net long-term capital gain.....	32,668.50
<hr/>	
Ordinary net income.....	\$459,485.93
Normal tax 24% of \$459,485.93.....	\$110,276.62
Surtax, 14% of \$459,485.93.....	64,328.03
25% of net long-term capital gain of \$32,668.50	8,167.13
<hr/>	
Income tax liability.....	\$182,771.78
Assessed	150,183.18
<hr/>	
Deficiency in income tax.....	\$ 32,588.60

1950

Schedule 3

Computation of Income Tax

Corrected net income, Schedule 1.....	\$349,143.95
Less dividends received credit, 85% of \$19,271.00.....	16,380.35
<hr/>	
Surtax net income.....	\$332,763.60
Less net long-term capital gain.....	48,578.54
<hr/>	
Surtax net income for purpose of alternative tax.....	\$284,185.06
Combined normal tax and surtax:	
42% of \$284,185.06.....	\$119,357.73
Less	4,750.00
<hr/>	
25% of net long-term capital gain of \$48,578.54.....	12,144.64
<hr/>	
Income tax	\$126,752.37
Excess profits tax.....	None
Income tax liability.....	\$126,752.37
Assessed	103,862.98
<hr/>	
Deficiency in income tax.....	\$ 22,889.39

Computation of Allowable Contributions

	<u>1944</u>	<u>1945</u>	<u>1946</u>	<u>1947</u>	<u>1948</u>	<u>1949</u>	<u>1950</u>
Amount of contributions:							
In taxable year	\$ 33,859.84	\$ - 0 -	\$ 1,485.57	\$ - 0 -	\$ 72,814.40	\$ 75,557.59	\$ 58,074.14
Carried over from prior years	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
Primary limitation--15% of covered compensation	\$ 33,859.84	\$ 19,785.30	\$ 22,461.45	\$ 34,475.40	\$ 42,347.54	\$ 51,562.31	\$ 60,000.00
Secondary limitation:							
(a) Twice primary limitation	\$ 67,719.68	\$ 39,570.60	\$ 44,922.90	\$ 68,950.80	\$ 84,695.08	\$ 103,124.62	\$ 120,000.00
(b)(1) Aggregate current and prior limitations	\$ 33,859.84	\$ 53,645.14	\$ 76,106.59	\$ 110,581.99	\$ 152,929.53	\$ 204,491.84	\$ 264,491.84
(2) Aggregate prior deductions	- 0 -	<u>33,859.84</u>	<u>33,859.84</u>	<u>35,345.41</u>	<u>35,345.41</u>	<u>108,159.81</u>	<u>183,717.40</u>
(3) Excess of (b)(1) over (b)(2)	\$ 33,859.84	\$ 19,785.30	\$ 42,246.75	\$ 75,236.58	\$ 117,584.12	\$ 96,332.03	\$ 80,774.44
(c) Lesser of (a) or (b)(3)	\$ 33,859.84	\$ 19,785.30	\$ 42,246.75	\$ 68,950.80	\$ 84,695.08	\$ 96,332.03	\$ 80,774.44
Amount deductible for year:							
(a) Contributions in year	\$ 33,859.84	- 0 -	\$ 1,485.57	- 0 -	\$ 72,814.40	\$ 75,557.59	\$ 58,074.14
(b) Contributions carried over	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
(c) Total	\$ 33,859.84	- 0 -	\$ 1,485.57	- 0 -	\$ 72,814.40	\$ 75,557.59	\$ 58,074.14
Excess contributions carried over to succeeding years	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

The computation of the amounts of the contributions shown above for the years 1948 through 1950 is as follows:

Date of Note	Total Amount	Applicable to Year		
		1948	1949	1950
May, 1948	\$ 30,466.86	\$ 30,466.86		
February 28, 1949	66,342.82	42,347.54	\$ 23,995.28	
February 15, 1950	84,568.49		51,562.31	\$ 33,006.18
April 17, 1950	<u>25,067.96</u>			<u>25,067.96</u>
Total		\$ 72,814.40	\$ 75,557.59	\$ 58,074.14

Served March 3, 1959.

[Endorsed]: T.C.U.S. Filed Feb. 27, 1959.

note was actually discharged on April 20, 1949 (Tr. 28) and is therefore deductible at that time.

The second note in the amount of \$66,342.82 was issued February 26, 1949, presumably as a contribution for the year 1948. The record shows (Tr. 29) that the respondent disallowed this as a deduction for petitioner in 1948 and petitioner signed a waiver of restrictions on assessment and collection of the resulting deficiency in tax. This note is properly deductible in 1949.

The third note is in the amount of \$84,568.49 and was issued February 15, 1950. The fourth note was in the amount of \$24,067.96 and was issued April 17, 1950. These two notes would be deductible in the year 1950.

The totals of the foregoing amounts of \$96,809.68 as deductible for the year 1949 and \$109,636.45 as deductible for the year 1950 are within the applicable limitations under the Code as per the attached recomputation. The amount of deficiency after allowing the foregoing deductions would be as per the attached deficiency recomputation and would result in a net deficiency for petitioner for the year ended 12/31/49 of \$24,522.81 and for the year ended 12/31/50 of \$1,233.22.

Petitioner requests the right of oral argument if the respondent disagrees with these recomputations.

Respectfully submitted,

/s/ A. R. KEHOE,
Attorney for Petitioner.

**AMOUNTS DEDUCTIBLE UNDER PRIMARY AND SECONDARY
LIMITATIONS PER RECOMPUTATION RULE 50**

Commissioner of Internal Revenue

15

	Year Ended 11/30/47	Year Ended 12/31/48	Year Ended 12/31/49	Year Ended 12/31/50
1. Amount of contribution				
(a) paid within fiscal year (cash).....	1,485.57	Nil	30,466.86	109,636.45
(b) paid within fiscal year (notes).....			66,342.82	
(c) less amount related to prior year.....				
(d) plus amount accrued from next year.....				
(e) total contributions for year.....	1,485.57	Nil	96,809.68	109,636.45
2. Primary limitation (15% of compensation).....	34,475.51	42,347.54	51,562.31	65,565.75
3. Secondary limitation				
(a) twice primary limitation.....			103,124.62	131,131.50
(b) total of all primary limitations (including current year)				
(c) total of all deductions for prior years.....			204,455.64	270,021.39
(d) excess of (b) over (c); (b) minus (c).....			35,345.41	134,155.09
(e) true limitation (lesser of (a) or (d)).....			169,110.23	135,866.30
4. Amount deductible			103,124.62	131,131.50
(a) on account of contributions in year.....	1,485.57	Nil	96,809.68	109,636.45
(b) on account of contributions carried over.....				
(c) Total	1,485.57	Nil	96,809.68	109,636.45

Note: The primary limitation of 15% of covered compensation for years prior to 1947 was:

1944	
1945	\$19,785.30
1946	\$22,461.45

A contribution deduction of \$33,859.84 was allowed for the year ended 11-30-44 and a contribution deduction of \$1,485.57 was allowed for the year ended 11-30-46. The latter is listed herein for the year ended 11-30-47 since the record (Tr. 67) shows it was paid Sept. 5, 1947. This makes no difference in the ultimate carryover computations.

RECOMPUTATION OF 1949 AND 1950 INCOME TAX PER
RULE 50 UNDER THE 9TH CIRCUIT COURT DECISION

1949

Original Net Income per return.....	\$ 407,519.62
Audit revisions—Income increased.....	164,942.40
Agreed revisions	(4,750.00)
Trust Fund deductions	(96,809.68)
<hr/>	
Net taxable income—revised.....	470,902.34
Deduct capital gains.....	32,668.50
Normal tax income.....	438,233.84
Applicable rate—38%	
<hr/>	
Normal and Surtax.....	166,538.86
Capital Gains Tax.....	8,167.13
<hr/>	
Revised tax liability	174,705.99
Amount paid	—150,183.18
<hr/>	
Net Deficiency (overassessment).....	24,522.81

1950

Original net income per return.....	294,645.42
Audit revisions—income increased	
Original audit	119,157.25
Agreed revisions	(6,584.58)
Trust fund deductions.....	(109,636.45)
<hr/>	
Net taxable income.....	297,581.64
Deduct—dividend received credit.....	(16,380.35)
Deduct—capital gains	(48,578.54)
Normal tax income.....	232,622.75
Applicable rate 42%—\$4,750.00	
<hr/>	
Normal and Surtax.....	92,951.56
Capital gains tax.....	12,144.64
<hr/>	
Revised tax liability.....	105,096.20
Amount paid	—103,862.98
<hr/>	
Net deficiency (overassessment).....	1,233.22

Served March 3, 1959.

[Endorsed]: T.C.U.S. Filed March 2, 1959.

[Title of Tax Court and Cause.]

PETITIONER'S OBJECTIONS TO RESPOND-
ENT'S COMPUTATION FOR ENTRY OF
DECISION

Petitioner's recomputation for entry of decision pursuant to the remand of the Court of Appeals for the Ninth Circuit would result in a deficiency for 1949 of \$24,522.81 and a deficiency for 1950 of \$1,233.22. Respondent's recomputation would result in a deficiency for 1949 of \$32,588.60 and a deficiency for 1950 of \$22,889.39. There is no difference between the parties except as to the year in which \$72,814.40 of contributions to the trust would be deductible.

The Court of Appeals' ultimate decision was:

"After taking the view of the law hereinabove indicated, this court must now come to the question of the year of deductibility of the employer's payments. The Third Circuit has taken the view that taxpayer on an accrual basis is entitled to deduct promissory notes as a contribution in the year issued. *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313. This court fully agrees with the case of *Anthony P. Miller, Inc.*, 3 Cir. 164 F. 2d 268, (on its facts) upon which the Court of Appeals for the Third Circuit relies in *Sachs and Slaymaker*. Under Section 23(p)(1) E of the 1939 Code a taxpayer 'on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year.' The *Sachs-Slaymaker* decision

is a reasonable, but not a required extension of the Miller case. The point is a close one. In such circumstances it seems unnecessary to set up a conflict between circuits. Therefore, it is held that delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. This would determine the year of deductibility.

“In the background of this case is the question of amounts allowable as deductions under permissible limits of the statute. It would appear that under the principles laid down the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were discharged. (Underscoring ours.)

The respondent charges the \$30,466.86 note that was dated January 10, 1948, but issued in May of 1948, and \$42,347.54 of the \$66,342.82 note that was dated and issued February 28, 1949, to the 1948 year even though that would throw the deduction into a barred year and would deny petitioner any benefit from the deduction and this despite the fact that respondent denied petitioner any deduction for these amounts in the years 1947 and 1948 in the first place. Respondent's only possible authority for such inequity is that it construes the Court of Appeals' ultimate decision quoted above to mean that the note issued in May of 1948 has to be charged to that year and \$42,347.54 of the \$66,342.82 note issued February 28, 1949, has to be charged to that same 1948 year because the note was a contribution for the year 1948 and constituted payment on the last day of that year because it was issued within 60 days of the close of that year.

The Court of Appeals was following the position of the Third Circuit in *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313, in holding that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date." Had it intended to relate the payment back to the last day of 1948 under Section 23 (p)(1)(E), providing that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," it would have said so. The Court of Appeals was aware of the fact that respondent had already denied petitioner a deduction for these amounts in 1947 and 1948 and that petitioner had filed a waiver and paid the resulting deficiency (Tr. 28 and 29). As a matter of fact, the Court of Appeals authorized the deduction of the \$30,466.86 note in 1949 when paid even though issued in 1948 when it concluded:

"It would appear that under the principles laid down, the allowable deductions can readily be calculated by the Tax Court for the years in which the note obligations were discharged."

In any event the respondent's position on the \$66,342.82 note issued in 1949 overlooks completely one important aspect of Section 23(p)(1)(E) that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," and that is that the election is permissive. The American Law Institute "Basic

Pension and Profit-Sharing Plans" (June, 1957), pages 16 and 17, point this out in stating:

"Even though the employer is on the accrual basis of accounting, the general rule is that contributions under a qualified plan are deductible only for the taxable year of the employer in which they are paid. However, since the largest proportion of employers are on the accrual basis, there is an exception to this general rule which is a tail that wags the dog. It is that an accrual basis employer may accrue a contribution as of the last day of the employer's taxable year and deduct the contribution, subject to the applicable limitations as to amount, if it is actually paid by the due date for filing the employer's income tax return for the taxable year. Before the 1954 Code, the accrued contribution had to be paid within sixty days after the end of the taxable year."

The Commissioner's own regulations construing Section 23(p)(1)(E) are consistent with the permissive nature of the deduction. Regulations III, Section 29.23(p)-1 in referring to Section 23(p)(1)(E) states:

"This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation, provided payment is actually made within sixty days after the close of the year of accrual."

It would be astounding indeed if respondent could here deny this petitioner a permissive deduction in 1948 and then after petitioner acquiesces in such

denial later force the deduction back to that year when any benefit is barred by the Statute of Limitations.

The Court of Appeals intended to give this trust the complete tax benefits it was entitled to as a qualified trust despite "the shortcomings of the errant taxpayer." It did not intend to give sixty per cent relief through the avaricious construction now advanced by the respondent.

Respectfully submitted,

/s/ A. R. KEHOE,
Attorney for Petitioner.

Served March 24, 1959.

[Endorsed]: T.C.U.S. Filed March 23, 1959.

Tax Court of the United States
Washington

Docket No. 50122

TIME OIL CO., Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit, dated Sep-

tember 4, 1958, and the order of this Court, dated March 2, 1959, the respondent filed a recomputation on February 27, 1959, and a memorandum brief on March 31, 1959, and the petitioner filed a recomputation on March 2, 1959, and objections to respondent's recomputation on March 23, 1959. This proceeding came on for hearing on April 1, 1959, at which time counsel for petitioner appeared. After having considered the recomputations and the briefs and the arguments of counsel, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1949 and 1950 in the amounts of \$32,588.60 and \$22,889.39, respectively.

[Seal] /s/ G. G. WITHEY,
Judge.

Entered: April 7, 1959.

Served April 8, 1959.

In The United States Court of Appeals
For The Ninth Circuit

Tax Court Docket No. 50122

TIME OIL CO., a Washington corporation,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITION TO CORRECT THE DECISION OF
THE TAX COURT TO ACCORD WITH
THE MANDATE OF THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The petitioner on review, Time Oil Company, a corporation organized and existing by virtue of the laws of the State of Washington, by and through its attorney, A. R. Kehoe, petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States in this proceeding on the 7th day of April, 1959. This petition for review is filed pursuant to the provisions of Section 7481(3) of the Internal Revenue Code, as amended, to correct the decision of the Tax Court to accord with the mandate of the United States Court of Appeals for the Ninth Circuit dated September 4, 1958.

This proceeding concerns the decision of the Tax Court after remand by the Court of Appeals for the Ninth Circuit that petitioner had deficiencies in income tax for the taxable years 1949 and 1950 in the amounts of \$32,588.60 and \$22,889.39, respectively. The decision of the Tax Court was entered April 7, 1959, after respondent filed a recomputation pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit on February 27, 1959, and a Memorandum Brief on March 31, 1959, and the petitioner filed a recomputation on March 2, 1959, and Objections to Respondent's Recomputation on March 23, 1959, and after oral argument of both petitioner and respondent in Washington, D. C., on April 1, 1959.

Nature of Controversy

Petitioner's recomputation for entry of decision pursuant to the mandate of the Court of Appeals for the Ninth Circuit would result in a deficiency for 1949 of \$24,522.81, and a deficiency for 1950 of \$1,233.22. Respondent's recomputation and the Tax Court's decision which followed respondent's recomputation resulted in a deficiency for 1949 of \$32,588.60 and a deficiency for 1950 of \$22,889.39.

The Court of Appeals' ultimate decision was:

"After taking the view of the law hereinabove indicated, this court must now come to the question of the year of deductibility of the employer's payments. The Third Circuit has taken the view that taxpayer on an accrual basis is entitled to deduct promissory notes as a contribution in the year

issued. *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313. This court fully agrees with the case of *Anthony P. Miller, Inc.*, 3 Cir. 164 F. 2d 268, (on its facts) upon which the Court of Appeals for the Third Circuit relies in *Sachs and Slaymaker*. Under Section 23(p)(1) E of the 1939 Code a taxpayer 'on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year.' The *Sachs-Slaymaker* decision is a reasonable, but not a required extension of the *Miller* case. The point is a close one. In such circumstances it seems unnecessary to set up a conflict between circuits. Therefore, it is held that delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. This would determine the year of deductibility.

"In the background of this case is the question of amounts allowable as deductions under permissible limits of the statute. It would appear that under the principles laid down the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were discharged." (Underscoring ours.)

There were four note contributions involved in this proceeding.

The first note was in the amount of \$30,466.86. While the note was dated January 10, 1948, and was issued presumably as a contribution for the year 1947, the record shows (Tr. 28) that it was not delivered to the trustees until May of 1948. The

record further shows that the respondent denied petitioner a deduction for the \$30,466.86 in the year 1947, and that petitioner signed a waiver of restrictions on assessment and collection of the resulting deficiency in tax (Tr. 28 and 29).

The second note is in the amount of \$66,342.82 and was issued February 28, 1949, presumably as a contribution for the year 1948. The record shows (Tr. 29) that the respondent disallowed this as a deduction for petitioner in 1948 and petitioner signed a waiver of restrictions on assessments and collection of the resulting deficiency in tax.

The third note is in the amount of \$84,568.49 and was issued February 15, 1950.

The fourth note was in the amount of \$25,067.96 and was issued April 17, 1950.

The only amounts in controversy in this petition to correct the decision of the Tax Court to accord with the mandate of the United States Court of Appeals are the \$30,466.86 represented by the note dated January 10, 1948, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949. The recomputation of the respondent and the Tax Court's decision would throw the deduction for the amounts of \$30,466.86 and \$42,347.54 into the year 1948, which is now a barred year, and this would deny petitioner any benefits from the deduction whatsoever despite the fact that respondent had previously denied petitioner any deduction for these amounts in the years 1947 and 1948 in the first place when taxpayer had so taken them.

One important consideration should be initially

noted. This case was remanded at respondent's insistence in footnote 12 of his brief to enable the Tax Court to determine the allowable deductions under the primary and secondary limitations of Section 23(p)(1)(C) of the Code and Regulations 111, Sec. 29.23(p)-10 relating thereto. There is no disagreement between the parties hereto that the full amounts of deductions as now asserted by petitioner would be allowable under the primary and secondary limitations of the Statute and Regulations referred to.

The position of the respondent and the Tax Court is premised on a construction of the Court of Appeals' ultimate decision to the effect that the note issued in May of 1948 in the amount of \$30,466.86 has to be charged to that year since it was issued in that year more than sixty days after the close of the year 1947, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949, has to be charged to that same 1948 year because the note was a contribution for the year 1948 and constituted payment on the last day of that year because it was issued within sixty days of the close of that year. The \$42,347.54 is the maximum respondent can allocate to the year 1948 under the limitation of 15% of the aggregate compensation of eligible employees for that year.

It is the position of the petitioner that the Court of Appeals in this case authorized the deduction for the \$66,342.82 in the year 1949 since the note was delivered in the year 1949.

The Court of Appeals was following the position

of the Third Circuit in *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313, in holding that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date." Had the Court of Appeals intended to relate the payment back to the last day of 1948 under Section 23(p)(1)(E) providing that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," it would have said so. It is petitioner's position that the Court of Appeals was aware of the fact that respondent had already denied petitioner a deduction for this amount in 1948 and that petitioner had filed a waiver and paid the resulting deficiency (Tr. 29).

In addition, the position of the Tax Court and the respondent on the \$66,342.82 note issued in 1949 completely overlooks one important aspect of Section 23(p)(1)(E) of the Code. While Section 23(p)(1)(E) provides that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," the accrual has been deemed to be permissive rather than mandatory. The Commissioner's own regulations established the permissive nature of the deduction. In Regulations 111, Section 29.23 (p)-1, referring to Section 23(p)(1)(E) of the Code, the Commissioner states:

“This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation provided payment is actually made within sixty days after the close of the year of accrual.”

It would appear to petitioner that it would be astounding indeed if respondent could here deny this petitioner a permissive deduction in 1948 and then, after petitioner acquiesces in such denial, later force the deduction back to that year when any benefit is barred by the statute of limitations.

It is petitioner's position that the Court of Appeals authorized the deduction of even the \$30,-466.86 note in 1949 when paid, even though issued in 1948, when it concluded:

“It would appear that under the principles laid down, the allowable deductions can readily be calculated by the Tax Court for the years in which the note obligations were discharged.”

The use of the word “discharged” would clearly indicate a deduction at the time of payment of the note if deduction had not been allowed at the time the note was issued.

It is petitioner's position that the Court of Appeals intended to give this trust the complete tax benefits it was entitled to as a qualified trust despite “the shortcomings of the errant taxpayer.” It did not intend to give 60% relief through the narrow construction advanced by the respondent and adopted by the Tax Court.

Petitioner, being aggrieved by the decision of the

Tax Court dated April 7, 1959, and believing that the decision did not follow the mandate of the Court of Appeals for the Ninth Circuit dated September 4, 1958, desires to obtain a review of the Tax Court's decision and a correction thereof to accord with the mandate of the decision of the United States Court of Appeals for the Ninth Circuit.

Wherefore, it petitions that a transcript of the hearing in the Tax Court on the entry of the decision pursuant to mandate of the United States Court of Appeals together with the respondent's recomputation filed February 27, 1959, and Memorandum Brief filed March 31, 1959, and Petitioner's recomputation filed March 2, 1959, and objections to respondent's recomputation filed on March 23, 1959, in the United States Tax Court, Docket No. 50122, be certified and transmitted to the Clerk of the United States Court of Appeals for the Ninth Circuit for filing and appropriate action to the end that the errors complained of may be reviewed and corrected by the United States Court of Appeals for the Ninth Circuit.

/s/ A. R. KEHOE.

Duly Verified.

[Endorsed]: T.C.U.S. Filed May 4, 1959.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION TO CORRECT
THE DECISION OF THE TAX COURT

To: Arch M. Cantrall, Chief Counsel, Internal Revenue Service, Internal Revenue Building, Washington, D. C.

You are hereby notified that the above petitioner has filed with the Clerk of the United States Tax Court at Washington, D. C., a Petition to Correct the Decision of the Tax Court to Accord with the Mandate of the United States Court of Appeals for the Ninth Circuit. A copy of said petition as filed is hereto attached and served upon you.

Dated this 1st day of May, 1959.

/s/ A. R. KEHOE,
Counsel for Petitioner.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed May 5, 1959.

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on review and docketing the petition for review in the United States Court of Appeals for the Ninth Circuit is extended to August 2, 1959.

Dated: Washington, D. C., May 26, 1959.

/s/ J. E. MURDOCK,
Judge.

Served May 26, 1959.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review" (excepting item 5 of the designation which is not of record) in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States at Washington, in the District of Columbia, this 17th day of June, 1959.

[Seal]

HOWARD P. LOCKE,
Clerk of the Court,

/s/ By GERTRUDE W. COLL,
Deputy Clerk.

[Endorsed]: No. 16534. United States Court of Appeals for the Ninth Circuit. Time Oil Co., a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 30, 1959.

Docketed: July 9, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 16534

TIME OIL CO., a Washington Corporation,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS ON PETITION TO
CORRECT THE DECISION OF THE TAX
COURT TO ACCORD WITH THE MAN-
DATE OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

Petitioner hereby designates the following State-
ment of Points on which it intends to rely in its ap-

peal from the decision of the United States Tax Court made and entered April 7, 1959, in Tax Court Docket No. 50122 after Remand from the United States Court of Appeals for the Ninth Circuit.

I.

This proceeding concerns the decision of the Tax Court after remand by the Court of Appeals for the Ninth Circuit that petitioner had deficiencies in income tax for the taxable years 1949 and 1950 in the amounts of \$32,588.60 and \$22,889.39, respectively. The decision of the Tax Court was entered April 7, 1959, after respondent filed a recomputation pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit on February 27, 1959, and a Memorandum Brief on March 31, 1959, and the petitioner filed a recomputation on March 2, 1959, and Objections to Respondent's Recomputation on March 23, 1959, and after oral argument of both petitioner and respondent in Washington, D. C., on April 1, 1959. The Tax Court Decision determined that Respondent's Recomputation was correct. Petitioner's recomputation would result in a deficiency for 1949 of \$24,522.81, and a deficiency for 1950 of \$1,233.22.

II.

The Court of Appeals' ultimate decision was:

"After taking the view of the law hereinabove indicated, this Court must now come to the question of the year of deductibility of the employer's payments. The Third Circuit has taken the view that

taxpayer on an accrual basis is entitled to deduct promissory notes as a contribution in the year issued. *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313. This Court fully agrees with the case of *Anthony P. Miller, Inc.*, 3 Cir. 164 F. 2d 268, (on its facts) upon which the Court of Appeals for the Third Circuit relies in *Sachs and Slaymaker*. Under Section 23(p)(1) E of the 1939 Code a taxpayer 'on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year.' The *Sachs-Slaymaker* decision is a reasonable, but not a required extension of the *Miller* case. The point is a close one. In such circumstances it seems unnecessary to set up a conflict between circuits. Therefore, it is held that delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. This would determine the year of deductibility.

"In the background of this case is the question of amounts allowable as deductions under permissible limits of the statute. It would appear that under the principles laid down the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were discharged." (Underscoring ours.)

III.

There were four note contributions involved in this proceeding. The first note was in the amount of \$30,466.86. While the note was dated January 10,

1948, and was issued presumably as a contribution for the year 1947, the record shows (Tr. 28) that it was not delivered to the trustees until May of 1948. The record further shows that the respondent denied petitioner a deduction for the \$30,466.86 in the year 1947, and that petitioner signed a waiver of restrictions on assessment and collection of the resulting deficiency in tax (Tr. 28 and 29).

The second note is in the amount of \$66,342.82 and was issued February 28, 1949, presumably as a contribution for the year 1948. The record shows (Tr. 29) that the respondent disallowed this as a deduction for petitioner in 1948 and petitioner signed a waiver of restrictions on assessments and collection of the resulting deficiency in tax.

The third note is in the amount of \$84,568.49 and was issued February 15, 1950.

The fourth note was in the amount of \$25,067.96 and was issued April 17, 1950.

IV.

The only amounts remaining in controversy are the \$30,466.86 represented by the note dated January 10, 1948, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949. The Tax Court's decision places the deduction for the amounts of \$30,466.86 and \$42,347.54 into the year 1948, which is now a barred year.

The position of the respondent and the Tax Court is premised on a construction of the Court of Appeals' ultimate decision to the effect that the note issued in May of 1948 in the amount of \$30,466.86

has to be charged to that year since it was issued in that year more than sixty days after the close of the year 1947, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949, has to be charged to that same 1948 year because the note was a contribution for the year 1948 and constituted payment on the last day of that year because it was issued within sixty days of the close of that year. The \$42,347.54 is the maximum respondent can allocate to the year 1948 under the limitation of 15% of the aggregate compensation of eligible employees for that year.

It is the position of the petitioner that the Tax Court was in error and that the Court of Appeals in this case authorized the deduction for the \$66,342.82 in the year 1949 since the note was delivered in the year 1949.

The Court of Appeals was following the position of the Third Circuit in *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313, in holding that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. Had the Court of Appeals intended to relate the payment back to the last day of 1948 under Section 23(p)(1)(E) providing that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," it would have said so. It is petitioner's position that the Court of Appeals was aware of the fact that respondent had already denied petitioner a deduction for this amount in 1948 and that peti-

tioner had filed a waiver and paid the resulting deficiency (Tr. 29).

It is petitioner's position that the Tax Court was in error on the \$30,466.86 note and that the Court of Appeals authorized the deduction of even that note in 1949 when paid, even though issued in 1948, when it concluded:

"It would appear that under the principles laid down, the allowable deductions can readily be calculated by the Tax Court for the years in which the note obligations were discharged." The use of the word "discharged" would clearly indicate a deduction at the time of payment of the note if deduction had not been allowed at the time the note was issued.

/s/ A. R. KEHOE,
Counsel for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 23, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by the parties in this proceeding that if it is necessary for ultimate decision the Court may refer to and have access to the original briefs and transcript in this proceeding in addition to the transcript and briefs filed on this petition.

/s/ A. R. KEHOE,
Counsel for Petitioner.

/s/ HOWARD A. HEFFRON,
Acting Assistant Attorney General, Tax Division,
United States Department of Justice, Wash-
ington 25, D. C., Counsel for Respondent.

[Endorsed]: Filed July 23, 1959. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE CON- TENTS OF THE RECORD TO BE PRINTED

To The Clerk of The Above Entitled Court:

Appellant designates the following portions of
the record to be printed:

Tax Court Docket No. 50122:

1. Docket Entries.
2. Respondent's computation for the entry of
decision filed February 27, 1959.

3. Petitioner's computation for the entry of decision filed March 2, 1959.

4. Petitioner's objections to respondent's computation filed March 23, 1959.

5. Minutes of Proceeding before Tax Court on Petition to correct the Decision of the Tax Court to accord with the mandate of the United States Court of Appeals for the Ninth Circuit.

6. Decision of the Tax Court on remand dated April 7, 1959.

7. Petition for Review.

8. Proof of Service.

9. Designation of Contents of Record.

10. Order Enlarging Time.

United States Court of Appeals for the Ninth Circuit No. 16534:

11. Appellant's Designation of the Contents of the Record to be printed.

12. Statement of Points on Petition to Correct the Decision of the Tax Court to accord with the mandate of the United States Court of Appeals for the Ninth Circuit.

13. Stipulation on original transcript and briefs.

/s/ A. R. KEHOE,
Counsel for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 23, 1959. Paul P. O'Brien, Clerk.